In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 865

E. W. BUSCHMAN CO., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 11–16) is reported at 380 F. 2d 255. The Board's decision and order (Pet. App. 17–19) are reported at 153 NLRB 699.

JURISDICTION

The judgment of the court of appeals was entered on July 20, 1967 (Pet. App. 16). A petition for rehearing was denied on September 5, 1967 (Pet. App. 17). The petition for a writ of certiorari was filed on November 30, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board properly concluded that the employer violated the National Labor Relations Act by discharging three employees, who were members of the union bargaining committee, because they had prepared, signed and procured signatures for a petition requesting the union to remove from the bargaining committee another member whom they disfavored.

STATUTE INVOLVED

The relevant portions of the National Labor Relations Act are set forth in the Appendix to the petition (p. 20).

STATEMENT

In July 1963, petitioner Company and the Union [1] engaged in negotiations for the purpose of arriving at a new collective bargaining agreement to succeed the existing one which expired at midnight on July 23, 1963 (J.A. 6a; 76a, 127a).[2] Employees Charles Bole, Herman Clouse, and Bernard Feltner served as Union stewards and members of the Union's bargaining committee (J.A. 6a; 61a, 74a, 127a, 174a). At the bargaining session on the afternoon of July 23, International Union Representative Patrick Williams participated in the negotiations for the first time (J.A. 6a; 76a–77a). At this meeting the Company submitted an offer which, if accepted, would have resulted in a new contract (J.A. 5a; 77a).

[1] Local 522 of the International Association of Bridge, Structural and Ornamental Iron Workers, AFL–CIO.

[2] "J.A." refers to the portion of the record printed as a joint appendix in the court below.

That evening, at a meeting presided over by Williams, the employees rejected the Company's offer (J.A. 6a; 77a–78a, 127a–128a). A motion was then made by Feltner and seconded by another employee for a "tentative" strike vote (J.A. 7a; 78a, 128a). Williams opposed the motion, and, after a heated discussion, refused to put the strike motion to a vote and abruptly adjourned the meeting (J.A. 7a; 78a–80a, 128a–132a). After the meeting, a group of employees, led by Bole, Feltner, and Clouse, discussed the advisability of excluding Williams from further negotiations (J.A. 7a; 80a–81a, 132a–133a).

The next morning, July 24, Bole brought a petition to work which requested the Union not to permit Williams "to be present at any future meetings on contract negotiations between the E. W. Buschman Co. and Local #522" (J.A. 7a; 82a, 84a, 133a–134a, 358a–359a). Bole arrived at the plant at about 7:30 a.m., one-half hour before the normal starting time (J.A. 7a; 72a, 87a–88a). He took the petition to Clouse's work area, and he, Clouse, and Feltner signed their names to the petition, followed by their titles (J.A. 8a; 85a–86a, 135a, 126a). They remained in the work area and made the petition available for other employees to sign (J.A. 8a; 86a, 135a–137a, 124a–125a, 281a). When the three-minute warning whistle sounded at 7:57 a.m., signaling the beginning of the work day, Bole picked up the petition and locked it inside his desk drawer, where it remained until the lunch hour (J.A. 8a; 86a, 135a–136a). During the morning, Company supervisors reported the circula-

tion of the petition to Plant Superintendent John Graziani and President Rudy Vogt (J.A. 20a–21a; 117a–118a, 276a, 279a–281a, 294a, 220a–221a, 312a–318a).

Shortly before leaving the plant for lunch, Bole removed the petition from his desk and laid it on a desk in Clouse's department, in open view (J.A. 8a; 136a–137a, 168a). While Bole was out for lunch, Graziani came to where the petition was lying, read it, and later took it to his office (J.A. 8a; 168a–169a). Thereafter, Graziani pulled the time cards of the three stewards (J.A. 169a–170a, 175a–176a, 93a, 136a–137a).

The three stewards assembled outside of Graziani's office between noon and 12:30 P.M. (J.A. 7a–9a; 137a–138a, 92a–93a, 175a–176a). Inside, President Vogt, Graziani, Company Attorney Nicholas Bauer, and the stewards' foremen were conferring (J.A. 9a; 93a–95a, 138a–140a, 175a–176a). When the meeting broke up, the foremen told the stewards that they were fired and gave them their final checks (J.A. 9a; 94a, 140a, 176a). The foremen gave no reason for the discharges (J.A. 140a, 176a, 275a, 293a), but, when Clouse pressed the matter, Graziani or one of the other management officials told the stewards that they were being discharged for creating disunity among the employees (J.A. 38a, 9a; 94a–95a, 142a, 176a–177a, 239a). The stewards were also told that they would be advised by letter of the full reasons for their discharge (J.A. 9a; 177a, 95a, 239a, 141a). Graziani then ordered them out of the building and the foremen escorted them to

the front gate of the plant (J.A. 177a–178a, 141a–142a, 95a–96a).

On July 26, the Company mailed letters to the three stewards setting forth the following reasons for their discharge: they had created disunity among employees and failed to remain at their work stations during working hours; Bole and Clouse were insubordinate to supervisors; Clouse failed to do his work properly; and Feltner refused to work overtime and tried to persuade others not to work overtime (J.A. 9a–10a; 71a, 362a–365a).

An unfair labor practice proceeding against the Company ensued. Upon considering the circumstances of the stewards' discharge, the Board, in agreement with the trial examiner, found that the Company discharged Bole, Clouse, and Feltner, not for the reasons later advanced, but because they had prepared, signed, and procured signatures to their petition to change the makeup of the Union bargaining committee (J.A. 46a, 48a; Pet. App. 18); that their activity in this regard was protected by Section 7 of the Act; and that the discharges thus constituted restraint and coercion in violation of Section 8(a)(1) (J.A. 36a, 48a). The Board ordered the Company to offer the discharged employees reinstatement, and to reimburse them for lost wages (J.A. 49a–51a; Pet. App. 18–19).[3]

[3] A shop rule of the Company provides that "[s]oliciting or collecting contributions for any purpose whatsoever on our Company premises without the prior approval of management" shall be "cause for suspension or discharge" (J.A. 361a–362a). In addition to finding a violation based on the discharges

On review, the court of appeals sustained the Board's finding that the three employees were discharged because of their activity in regard to the petition relating to the composition of the Union bargaining committee. Accordingly, it held that the discharges were violative of Section 8(a)(1) of the Act, and enforced the Board order related thereto (Pet. App. 14, 16).

ARGUMENT

The holding of the court below respecting the discharge of the three stewards turns on the facts of this particular case and is clearly correct. There is thus no occasion for further review.

1. The Board found, and the court below agreed, that the three employees were discharged solely because of their role in preparing, signing, and procuring signatures for a petition asking the Union to ex-

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described above, the Board adopted the trial examiner's finding that the maintenance of the shop rule constituted an independent violation of Section 8(a)(1), since the rule, as phrased, was broad enough to prohibit union solicitation during the employees' non-working time (J.A. 12a–13a, 48a; Pet. App. 18). Petitioner admitted that the rule constituted a "technical" violation (J.A. 12a), and filed no exceptions to the examiner's finding respecting this matter. As a remedy for this additional violation, the Board ordered petitioner to cease and desist from maintaining a rule barring union solicitation during nonworking time (Pet. App. 18; J.A. 48a).

However, the court declined to enforce that part of the Board order which prohibited the maintenance of the Company's no-solicitation rule (see note 3, *supra*). The court found that the Union had consented to the issuance of the rule by letter (J.A. 244a), and had thus waived the right to solicit during non-working time which it might otherwise have had (Pet. App. 15).

clude International Representative Williams from the Union bargaining committee. By engaging in this activity, the three employees were attempting "to assure themselves and their like-minded fellow employees of a bargaining committee responsive to their desires * * *" (J.A. 36). It is well settled that "[a]ttempts by some members of a union to bring about a change in the union's attitude about * * * collective bargaining [constitutes] 'concerted activity' protected by Section 8(a)(1) of the Act." *National Labor Relations Board* v. *Nu-Car Carriers, Inc.*, 189 F. 2d 756, 760 (C.A. 3), certiorari denied, 342 U.S. 919. See also *National Labor Relations Board* v. *Aurora City Lines, Inc.*, 299 F. 2d 229, 231–232 (C.A. 7); *Salt River Valley Association* v. *National Labor Relations Board*, 206 F. 2d 325, 328 (C.A. 9).

2. Petitioner does not challenge the Board's finding that it discharged the three employees because of their activity in connection with the petition to change the composition of the Union bargaining committee; nor does it deny that the preparation and circulation of such a petition is, as a general matter, activity protected by Section 7 of the Act. It contends, however, that the Union, by accepting the Company's shop rule barring union solicitation in the plant during nonworking time, waived the employees' Section 7 right to circulate the petition (Pet. 6–7).

There is no merit, we submit, to petitioner's belated[6] contention. Even if the court below correctly

[6] In its brief to the trial examiner (p. 2), petitioner asserted that "there is absolutely no relation between [the shop] rule and the discharge of the three employees * * *." Moreover,

concluded that the Union acquiesced in the shop rule and that this acquiescence amounted to a waiver of the employees' Section 7 right to engage in union solicitation in the plant during non-working time,[6] the employees "were not discharged merely because they solicited on Company premises without the prior approval of management" (Pet. App. 16) in violation of the shop rule. Rather, they were discharged because the Company disfavored their attempt to remove International Representative Williams from the Union bargaining committee.[7] Whatever waiver flows from the Union's acquiescence in the no-solicitation rule, that rule certainly cannot be construed as empowering the Company to discipline employees merely for pursuing such an objective.

3. Finally, petitioner is mistaken in asserting that the court of appeals acted inconsistently in finding the no-solicitation rule binding on the Union and yet concluding that a violation of Section 7 rights was

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petitioner conceded that the shop rule might constitute a "technical violation of 8(a)(1) of the Act" (J.A. 12a), and filed no exceptions with the Board respecting the examiner's finding that the rule was in fact unlawful.

[6] However, it is settled that a waiver of statutory rights must be clear and unmistakeable. See *National Labor Relations Board* v. *Perkins Machine Co.*, 326 F. 2d 488, 489 (C.A. 1). That was hardly the case here (see note 3, *supra*).

[7] As the court below stated, "There was substantial evidence that the Company * * * knew that the three stewards were the motivating force for rejecting the Company's offer and excluding Williams" (Pet. App. 14), and "[t]he thrust of the Board's finding was that the Company wanted to remove the shop stewards who opposed the proposed contract and threatened the Company with a strike" (Pet. App. 15–16).

volved. Contrary to petitioner's contention (Pet. 6–10), the inapplicability or invalidity of the shop rule was not a necessary predicate to the Board's finding that the discharges were unlawful. Thus, petitioner was in no sense found to have violated Section 7 rights not protected by the Act; nor did the court below fail to give effect to the shop rule.[8]

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1967.

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[8] Since the discharges were not predicated on violation of the shop rule, the court below correctly concluded that there is no conflict between its decision here and the cases where employees have been discharged for engaging in union activity in violation of provisions in collective bargaining agreements barring such activity (see Pet. App. 15). Accordingly, the cases relied upon by petitioner as presenting a conflict (Pet. 4–6) are plainly distinguishable.

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